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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

VERNEL SHAW, Plaintiff and Appellant, v. UNIVERSAL STUDIOS, INC., Defendant and Respondent.	B175215 (Super. Ct. No. BC 296346)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Affirmed in part, reversed in part.

Mancini & Associates, Marcus A. Mancini, David Cohn**;** Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tracey A. Kennedy and Daniel J. McQueen for Defendant and Respondent.

Vernel Shaw appeals from the judgment dismissing his third amended complaint for racial discrimination and retaliation after the trial court sustained the demurrer of Universal Studios, Inc. (Universal) without leave to amend. We reverse the judgment as to the discrimination claim but affirm as to the retaliation claim.

BACKGROUND

Because we are reviewing an order sustaining a demurrer without leave to amend, we assume the truth of the complaint's properly pleaded or implied factual allegations. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Universal has employed Shaw as a tram driver since 1996. Shaw is African-American.

Universal's policy is to assign seniority within a group of contemporaneous new hires on a random basis. But when Shaw was hired, Jim Waitkus, the lead dispatcher and a reputed "'bigot[,]'" manipulated the process so that Shaw and the one other African-American hired at that time were last in seniority.

In every year from 1998 to the present, Shaw has sought to bid on desirable jobs that are assigned annually. Universal has prevented him from bidding on the jobs by keeping secret the times when the jobs are open for bid, despite Shaw's repeated requests for this information. Universal informs only non-African-American drivers, whom Universal favors, about the openings. The jobs are ultimately given to non-African-American drivers with less seniority than Shaw.

At least 20 times each year, from 1996 through 2003, Universal has taken the following actions against Shaw but not against non-African-American drivers: (1) Universal forced Shaw to drive two tours back-to-back without a break; (2) it scheduled Shaw for shifts that are less likely to include VIP tours, which are desirable assignments (dispatchers told Shaw that some VIPs might "'not be comfortable with blacks[]'"); (3) it passed over Shaw for VIP tours and other desirable assignments, which are often given to non-African American drivers even though they often have less seniority than Shaw; (4) it failed to call Shaw for work when he is supposed to be called pursuant to his seniority; (5) it scheduled Shaw for less desirable assignments such as handicapped tours, which

require extensive physical labor tying down wheelchairs, when he should have been scheduled for more desirable assignments pursuant to his seniority.

Shaw also was disciplined in the following ways, in violation of Universal policy: (1) He was called "at the last minute" and disciplined "if he were slightly late," although policy states that a driver is entitled to at least two hours of notice; and (2) he was given a written warning in 2003 when he had accumulated "attendance points" that, according to policy, warranted only a verbal warning.

In 1997, Shaw told his union representative that he thought he was being discriminated against because of his race. In February 2003, Shaw filed a discrimination complaint with the Department of Fair Employment and Housing (DFEH). In June 2003, he filed a grievance alleging he was not called for work for discriminatory reasons, and in August 2003, he filed another grievance "for failure to provide a favorable assignment which he was due for discriminatory reasons."

Allegedly in retaliation for Shaw's various complaints of discrimination, in January 2004, a dispatcher falsely informed Shaw's union shop steward that Shaw had been a "no call/no show" for two days and would be fired the next day. Shaw responded with a written complaint that this was false and discriminatory. The dispatcher then called Shaw, apologized for the mistake, and said that the "no call/no show[]" had been "'erased.'"

After receiving a right-to-sue letter from the DFEH, Shaw filed suit against Universal on May 27, 2003, alleging claims for racial discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA). In its demurrer, Universal argued that the discrimination claim is time-barred because it alleges only one discriminatory act (i.e., the manipulation of Shaw's seniority when he was hired in 1996), which occurred well outside the statutory period of one year, and because the later effects of that single act do not give rise to separate, timely claims. As for the retaliation claim, Universal argued that Shaw had not alleged a retaliatory adverse employment action.

The trial court sustained the demurrer with leave to amend. Universal demurred to Shaw's subsequent amended complaints on similar grounds. The court ultimately

sustained Universal's demurrer to the third amended complaint on the ground that Shaw failed to allege a materially adverse employment action during the statutory period. As regards the discrimination claim, the court reasoned that "[p]laintiff's allegations establish no more than that in the past eight years defendant has, on many occasions, given plaintiff a schedule which was undesirable to him, and that plaintiff's co-workers have twice made racially derogatory remarks. As a result of defendant's scheduling plaintiff has had less opportunity than his non-African-American co-employees to be a driver for VIP tours, and also has had to deal more often with challenging handicapped tours. It is possible that on more than one occasion from 2001 and 2004 plaintiff was given a schedule which he did not like. The infrequency of these inconveniences cannot be considered as substantial and continuing employment actions." And the court rejected the retaliation claim on the ground that Shaw had failed to allege a retaliatory adverse employment action.

STANDARD OF REVIEW

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)" (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.) We construe the allegations of the complaint liberally, with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) We "must also consider judicially noticed matters. [*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.] In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an

amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081.)

DISCUSSION

I. The Discrimination Claim

Shaw argues that the trial court erred in concluding that he failed to allege a materially adverse employment action within the statutory period. We agree with Shaw.

The Supreme Court recently addressed the issue of adverse employment action in the context of a retaliation claim under the FEHA (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 (hereafter *Yanowitz*)), but its analysis is equally applicable to Shaw's discrimination claim. The Court held that "an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable," and this definition "must be interpreted broadly to further the fundamental antidiscrimination purposes of the FEHA." (*Yanowitz, supra*, 36 Cal.4th at pp. 1052-1053.) Accordingly, adverse employment action includes not only "so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [a discrimination or retaliation claim under the FEHA], the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id.* at p. 1054, footnotes omitted.)

Shaw alleges that, in every year from 1998 to the present, he has sought to bid on desirable jobs that are assigned annually, but Universal has prevented him from bidding on those jobs by keeping secret the times when the jobs are open for bid, despite Shaw's repeated requests for this information. He further alleges that Universal informs only

non-African-American drivers, whom Universal favors, about the openings, and that the jobs are ultimately given to non-African-American drivers with less seniority than Shaw. On that basis alone, Shaw has sufficiently alleged an adverse employment action to withstand Universal's demurrer. Interpreting the allegations liberally, we infer that the work assignments in question are sufficiently desirable to be materially different from other work assignments, because Universal specifically holds them open for bid once each year. But, according to Shaw, he and other African-American drivers are prohibited from even bidding on those desirable assignments, which are reserved for non-African-Americans. Preventing Shaw and other African-Americans from seeking those desirable work assignments, which are reserved for non-African-Americans, materially affects the terms, conditions, or privileges of Shaw's employment—Shaw is denied the privilege of bidding on assignments that are materially better than the assignments that are left open to him, and he is consequently forced to work under worse conditions than his non-African-American colleagues.

Universal presents no arguments to the contrary. In fact, Universal's demurrers and appellate brief never address or even mention Shaw's allegation that he was prevented from bidding on desirable jobs, an allegation that first appeared in Shaw's second amended complaint.

Universal does present one general argument that may have been intended to address this allegation, but it misses the mark. Universal argues on appeal, as it did in the trial court, that the bulk of Shaw's allegations of adverse employment action concern mere consequences, or effects, of the allegedly discriminatory manipulation of his seniority when he was hired in 1996, and that such consequences or effects do not give rise to separate, timely claims for discrimination.

Universal's argument fails here because Shaw does not in fact allege, or even suggest, that the prevention of his bidding on desirable jobs was in any way a result of his artificially reduced seniority. Actually, it is not clear that Shaw makes *any* allegations concerning effects or consequences of his artificially reduced seniority. Universal argues to the contrary, quoting Shaw's opening brief to the effect that Shaw was allegedly

denied "more lucrative shifts to which he is entitled based on his seniority, [given] shifts which require greater physical labor when he should not have been given those shifts based on his seniority," and similar claims. But in his brief (and in his pleadings) Shaw does not contend that *because of his artificially reduced seniority* he was given less lucrative and more physically demanding shifts than he otherwise would have received. Rather, he contends that *even his artificially reduced seniority entitled him* to more lucrative and less physically demanding shifts than those he was given, and that he was denied those more favorable assignments because of his race.

Beginning with his opposition to Universal's demurrer to the first amended complaint, Shaw explained that he was not alleging mere effects of the allegedly discriminatory manipulation of his seniority, and that his allegations of more recent discriminatory conduct were not dependent on that manipulation. He repeated the point in opposition to each subsequent demurrer. Universal nonetheless argued to the contrary in support of each demurrer and continues to do so on appeal. For the reasons we have explained, Universal's argument has no basis in Shaw's pleadings, so we reject it.

The allegation that from 1998 through the present Shaw was prevented from bidding on desirable work assignments that are open for bid each year sufficiently states an adverse employment action within the statutory period for Shaw's discrimination claim to survive Universal's demurrer. That conclusion makes it unnecessary for us to address the parties' other contentions concerning the discrimination claim.

II. The Retaliation Claim

Shaw argues that the trial court erred in concluding that he failed to allege a materially adverse employment action in support of his retaliation claim. We agree with the trial court.

Shaw's allegations of "retaliatory discipline" are all contained in the five sub-paragraphs of paragraph 14 of the third amended complaint. Of those five sub-paragraphs, four do not describe retaliatory discipline at all—they describe only Shaw's communication and filing of various complaints and grievances concerning alleged discrimination (*not* retaliation). The remaining sub-paragraph describes the incident in

which a dispatcher falsely informed Shaw's union shop steward that Shaw had been a "no call/no show" for two days and would be fired the next day. When Shaw responded with a written complaint that this was false and discriminatory, the dispatcher called Shaw, apologized for the mistake, and said that the "no call/no show[]" had been "'erased.'" There is no allegation that this incident had any adverse effect on Shaw's employment, so it cannot constitute an actionable adverse employment action.

Shaw has not alleged a materially adverse employment action in support of his retaliation claim, and he has not carried his burden on appeal of showing that he could cure that defect if he were granted leave to amend. We therefore affirm the dismissal of the retaliation claim.

DISPOSITION

The judgment is affirmed with respect to Shaw's retaliation claim. The judgment is reversed with respect to Shaw's discrimination claim. Shaw shall recover his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

VOGEL, J.